IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-158

ALLAN J. BESBRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner's Reply Brief

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Introduction

Petitioner files this Reply Brief to correct certain errors made by the government in its Brief in Opposition. Rule 24(4), Rules of the Supreme Court.

Argument

Statement of Government: The government states that "In 1969 and 1970, WLS entered into argeements with Bankers Finance and Holding Company (Banker's) and McDonald Investment Company (MIC) by which Banker's and MIC sold WLS's land sales contracts to investors." (Op. Br. 3)

Although an accurate statement of fact, the inference that these agreements were somehow connected or interrelated, and thereby part of an overall scheme to defraud, is improper. As was stated in Petitioner's Brief, Banker's and MIC were business competitiors that had no interrelated business at all. (Pt. Br.18)

The government further states that "As part of his duties, he [Petitioner] researched WLS lot purchases records to determine the number of

lots which were released for sale (Tr. 1852). *He thus became aware that many of WLS's contracts were not made with Bona Fide purchasers.*" (emphasis added) (Op. Br. 4)

Such argument is patently non-sequitur. Researching the lot inventory of WLS amounted to nothing more than a physical inventory of the lots which were sold (without regard to the underlying facts of any sale) versus the number of lots available for sale. From this information petitioner had no warning which alterted him to any of the fraudulent activity at WLS.

Furthermore, the government argues that

"By virtue of his position as corporate officer, petitioner was well aware of the general

scope of WLS's continuing efforts to defraud...". (Op. Br. 8)

Such argument is without foundation in the record, and in fact is contrary to the testimony of the government's chief witness, Mr. Hood, the president of WLS.

Mr. Hood testified that in the government's case in chief that he never told petitioner of the fraudulent activities of WLS. (Tr. 1531). Of all the victims of WLS, Petitioner spoke to only one, a Mr. McCollum. Mr. Hood testified that Petitioner made no representations as to the authenticity of the contracts sold to Mr. McCollum. (Tr. 1447)

Mr. Hood unrefutedly testified that over the seven year period WLS operated he sold approximately 800 lots. It was not uncommon for approximately five to

ten percent of those on-site sales to become delinquent or go into default. These were legitimate contracts which because of that attrition became the obligation of WLS to support because of its indorsement with recourse of the contracts. Mr. Hood lastly testified that there were only fifty to sixty fraudulent contracts involved at WLS. (Tr. 1511-1522)

Petitioner admitted that he knew WLS was supporting contracts, but also knowing that fifty or sixty contracts would not be an unusual number to support because of the volume of WLS's sales, petitioner was not alerted, by the fact of support, to draw the inference that the supported contracts were fraudulent. To assume otherwise is nonsense.

To make its argument as it does, the government must show where petitioner obtained the knowledge that there were fraudulent activities going on at WLS. The contrary knowledge of petitioner is clearly established in the record:

1. There is nothing evident from inventorying the lots available for sale other than a mechanical counting of the sold versus the unsold lots;

2. The number of contracts being supported (which well could have been delinquent or defaulted legitimate contracts) was within the acceptable range of contracts in default in the industry. This was no "red flag" to petitioner.

3. Petitioner made no representations as to authenticity of the contracts.

4. Mr. Hood never discussed the fraudulent activities of WLS with petitioner;

5. There was no distinctive marks made on the contracts or in the company records, available to petitioner, which separated delinquent and defaulted contracts from fraudulent ones. Both were marked with an "X"; (Tr. 1522)

6. Petitioner advised Mr. Hood not to sell any contracts, for economic reasons. (Tr. 1534).

Lastly, footnote 4 of the Opposition Brief suggests that petitioner was involved in selling land or in selling contracts from land sales. That is clearly erroneous. What petitioner did do, as a lawyer, was prepare an agreement which evidenced a loan between Mr. McCollum and WLS, with certain land sales contracts as collateral for that loan. The loan agreement called for WLS to pay "pre-paid" interest on the loan. With that money, Mr. McCollum purchased a land sales contract, sold to

him by WLS, not by petitioner.

1. *Voir Dire* Argument.

The government argues that the *voir dire* in this case was adequate because the massive publicity which existed did not mention Petitioner by name and that those who individually responded to the reading of the indictment by saying that they were acquainted with some of the individuals mentioned therein, did not indicate any bias from exposure to the publicity of which petitioner complains. The reason none of them indicated any bias is that no one asked them. They simply indicated that they were acquainted with some of the victims or parties and were excused.

The government suggests that our reliance upon *Shepard v. Maxwell*, 384 U.S. 333 (1966) is misplaced because the

voir dire was adequate to determine that none of the jurors knew the particulars of this case, nor did they know of petitioner's involvement in land sales fraud.

The issue before this Court is much broader: What did the jurors objectively know of fraudulent land sales activities in general?

The obvious source of their knowledge would have been the almost daily media and press saturation of the subject for almost two years before petitioner's trial. Arizona was rotten with land fraud, according to the media and press, and not one opportunity was ever missed to bring that fact to the public's mind. The press was very successful in that regard.

The Court's *voir dire*, such as it was, merely asked the jurors to subjectively assess their own attitudes about their prejudices and biases (ostensibly created by press coverage of land fraud in general) and speak out if they were "...so prejudiced one way or the other that [they] could not be fair and impartial in this case". (X Tr. 161-163)

No inquiry was made or allowed into what objective information these persons had in their minds, which well could have been the basis for their subjective determination of non-bias, despite petitioner's request for such inquiry.

The repetitious allegations, charges and revelations concerning fraudulent land development companies in the Arizona news media so subconsciously conditioned virtually every literate juror in the District that people who participated

in land sales activities were unsavory and born swindlers was such that admonitory instructions could not eradicate such beliefs.

In *Delaney v. United States*, 199 F.2d 107 (1st Cir.1952) the Court was led to observe:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may competently exclude even the unconscious influence of his preconceptions as to probable guilt, engineered by a pervasive pre-trial publicity."

By asking the jury panel, en masse, about any possible bias and prejudice they had, without asking them objectively

the source of that information is useless. As was noted in *Irvin v. Dodd*, 366 U.S. 717 at 728,

> "No doubt each juror was sincere when he said that he would be fair and impartial * * * but the pyschological impact requiring such a declaration before one's fellows is often its father."

In summary on this point, massive pre-trial publicity does not always have to attach to the particular defendant in order for it to be the kind of bias and prejudice that the law wishes to expose and eliminate from a jury. If the trial judge does nothing more than ask if any of the prospective jurors are biased and prejudiced against a defendant because they know him, or know of

the crime which he is accused of commiting as that crime relates to him (i.e. that Sam Shepard was accused of murder),without also asking what attitudes they may have formed about a crime which is constantly brought to their attention by the media and is particular to the community in which they live, then justice is not done if that defendant is convicted by a jury with an unprobed state of mind.

The law and the American system of criminal justice does not allow such a travistv of justice to remain uncorrected.

2. *Kotteakos* Argument.

The government views petitioner's argument as a request for him to have been separated from his co-defendants because the activities of which he was accused took place over a long period of time and he was present only a short part of that time.

That is only part of petitioner's argument.

In *Blumenthal v. United States*, 332 U.S. 539 (1947), this Court contrasted those defendants situations with that of Mr. Brown in the *Kotteakos* case. The Court said:

> "The case therefore is very different from the facts admitted to exist in the Kotteakos case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger, all-inclusive combination, all directed to achieving a single unlawful end or result."

The court then went on to demonstrate the differences. These may well be viewed as the criteria for determining

when a series of separate conspiracies exist as opposed to a single conspiracy with multiple parties.

The criteria are:

1. Were the separate agreements all tied to a single, all incompasing conspiracy or were they each separate agreements with its own distinct, illegal end?

2. Were all of the parties mutually interested in the outcome of the conspiracy, or was each conspirator only interested in whether his agreement was effective?

3. Did each conspirator aid the others to achieve the unlawful end, or rather did none aid in any way, by agreement or otherwise, the others in achieving the unlawful end?

The *Blumenthal* court then said

> " The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." 332 U.S. at 558.

As was set forth in Petitioner's Brief, pages 16-19, four separate schemes were proved by the evidence. The central or hub figure in each was Jacob Hood and his company, Western Land Sales. Separate spokes or agreements were made with Baumann, Banker's, and MIC, and with Petitioner in respect to loans

made by sophisticated investors to WLS.

Applying the criteria set forth in *Kotteakos* and amplified in *Blumenthal*, the following analysis emerges clearly:

1. According to the evidence, each agreement was distinct. Banker's bought and sold contracts from WLS. Baumann, the president of Banker's not only could care less what other involvement WLS had with MIC or Petitioner, but would have preferred, if given the choice, not to have WLS deal with them, so as to allow Banker's to have access to all of WLS's contracts, rather than only a small part of them. Likewise with MIC. MIC was a business competitior of Banker's and was totally unaware of the activities or even of the existence of Banker's. Clearly, each agreement was separate and unrelated. Furthermore, Petitioner was unrelated to either Banker's or MIC. Petitioner

was the attorney for WLS and its secretary. He aided WLS by introducing Hood to certain sophisticated investors whom he had formerly known with the end of those persons making loans to WLS, not purchasing contracts for resale to the public.

The only commonality was WLS. At an irrationally high level of abstraction, it could be argued that from WLS's viewpoint all of the agreements were part of an over-all scheme to raise money by the disposition of fraudulent contracts, but that was certainly no part of the agreement between any one of the co-conspirators with the others, inter se. Only Hood knew of the overall plan. That existed only in his mind. Never having been communicated in any way with the co-defendants, it hardly could have been part of their over-all scheme. There simply was no overal-all scheme.

2. No individual was at all interested in the acts of the other co-defendants and therefore could not have been interested or concerned with their activities as part of the outcome of the conspiracy. The evidence clearly showed, however, that each conspirator was vitally interested in the outcome of the agreement he had with WLS.

3. From the evidence, it was clear that none of the conspirators aided the other, expressly or otherwise, in the other's achieving the end of the agreement he had with WLS. Only Hood was interested in the over-all plan. He was very concerned that MIC continued to sell contracts. MIC was not at all concerned whether Banker's sold any contracts at all. Likewise, Banker's was very concerned that their contracts were sold, but did not care whether MIC sold any at all.

Furthermore, Petitioner advised Hood not to sell contracts at all, but to use them as a source of cash flow for his company. If it became necessary to raise money for operations, then Petitioner advised Hood to hypothecate the contracts for a short term, using them as collateral. Obviously, this in no way aided Banker's or MIC.

In summary, at a high level of abstraction, such as the level of abstraction wherein all men are brothers, or all nations are one people, certainly there was an overall scheme. But the law does not, and properly should not, attach criminal liability by trying all co-defendants together when they did not act at such a high level of abstractive conduct.

Each individual defendant participated with WLS totally independently of the other, and as such, should not have been tried together.

3. Unrefuted Arguments:

In its Brief in Opposition, the government has failed entirely to deal with the important issues raised in Petitioner's Brief concerning the issue of whether the question of single or multiple conspiracies in a trial of this sort and complexity is a matter of fact or of law. (Pt. Br. 20-22)

Furthermore, the government has not dealt with the issue of whether the judge has a duty to instruct the jury, sua sponte, in a case of this complexity, concerning the existance of multiple or single conspiracies.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: Scottsdale, Arizona
October 21, 1978

CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Supreme Court Bar, certify that I have deposited in the United States Mail, airmail postage prepaid, the original and forty copies of this PETITIONER'S REPLY BRIEF, addressed as follows:

Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C.

and that I deposited in the United States Mail, airmail postage prepaid, three copies of this PETITIONER'S REPLY BRIEF, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that this Certificate is made in compliance with Rule 33(3)(b), Rules of the Supreme Court.

This Cerfificate is filed on October 24, 1978 and that the mailings certified above took place on this date.

Harry M Weiss

Harry M. Weiss
Attorney for Petitioner